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SERVICE DATE - MARCH 25, 1997

SURFACE TRANSPORTATION BOARD

DECISION

STB Docket No. WCC-100

CARIBBEAN SHIPPERS ASSOCIATION, INC.

v.

NPR, INC. AND THE ADHERENCE GROUP, INC.

Decided: March 18, 1997

By separate motions filed August 12, 1996, defendants NPR, Inc. (NPR) and TAG/ICIB Services, Inc. (TAG)¹ move to dismiss a complaint filed by Caribbean Shippers Association, Inc. (CSA or complainant) on June 20, 1996. CSA filed a reply to the motions to dismiss on September 3, 1996, to which TAG responded on September 25, 1996.² This decision grants the motions to dismiss.

BACKGROUND

On June 20, 1996, CSA filed a complaint against NPR, a vessel operating common carrier (VOCC) providing transportation between the United States and Puerto Rico, and TAG, a cargo inspection service acting as NPR's agent.³ The complaint alleges that NPR and TAG unlawfully interfere in business dealings between CSA members and their customers. This interference assertedly takes the form of disclosing shipment and routing information to CSA members' competitors and other carriers, in violation of 49 U.S.C. 14908(a)(1). Complainant alleges that defendants' actions have resulted in harm to it and to its members.

CSA's members are non-vessel operating common carriers by water (NVOCCs)⁴ that ship containerized freight by water between

¹ TAG/ICIB Services, Inc., is the successor to The Adherence Group, Inc.

² TAG has also filed the following: (1) a motion for leave to file the September 25, 1996 response; (2) a "motion for protective order staying discovery" pending disposition of the motions to dismiss (to which CSA replied); and (3) a request for a 15-day extension of time from the service date of this decision to respond to complainant's first request for admissions (to which CSA replied).

TAG's motion for leave to file a response to CSA's reply will be granted and the statement accepted. Because discovery has not, in fact, proceeded during the pendency of the motions to dismiss, and because we are dismissing this case, TAG's other requests with respect to discovery are denied as moot.

³ NPR states that TAG previously provided delinquent accounts collection, demurrage billing, and collection and freight auditing services for NPR. NPR's motion to dismiss, p.3.

⁴ A NVOCC, as defined in section 3(17) of the Shipping Act of 1984, 46 U.S.C. App. 1702(3)(17), is "a common carrier that
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the United States and Puerto Rico. They use NPR and other "vessel operating common carriers by water" (VOCCs)--in particular, Sea-Land Service, Inc. (Sea-Land) and Crowley American Transport, Inc. (Crowley)--as their underlying ocean common carriers. CSA's members solicit freight and ship it in containers from United States customers to customers in Puerto Rico.

To assist it in carrying out its legal duty to collect its tariff rates, which it charges CSA, NPR, like other water common carriers, visually inspects shipments to ascertain that the commodity is accurately described on the shipping documents. NPR has delegated this cargo inspection authority to TAG.⁵ TAG performs similar inspection functions for Sea-Land, Crowley, and other VOCCs in other trades.⁶

Under its agreement with NPR (and its agreements with Sea-Land and Crowley), when a container arrives in Puerto Rico, TAG may open the container and inspect the cargo. TAG then determines whether the cargo reflects its description, weight and dimensions. If the cargo is accurately described, it moves to the consignee. If the cargo is not accurately described, and if a higher rate applies, TAG may retain the cargo until the higher charges are paid or until other arrangements are made.

CSA complains that TAG improperly divulges to other parties the confidential information that it obtains during its inspections, in violation of 49 U.S.C. 14908(a)(1). It seeks: (1) an order directing NPR and TAG to cease and desist from any violation of section 14908(a) and any other violation of the ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803 (ICCTA), as may subsequently be established in this proceeding; (2) an order requiring TAG to return to all shippers, consignees, receivers, or other owners of cargo shipped through the services of NPR all records or other documentation obtained from NPR and other specified parties; (3) an award to CSA of all costs, expenses, and reasonable attorneys fees incurred as a result of this proceeding. Complaint at 6-7.

THE MOTIONS TO DISMISS

⁴(...continued)
does not operate the vessels by which the ocean transportation is provided, and is a shipper in its relationship with an ocean common carrier." In essence, NVOCCs are middlemen (analogous to freight forwarders in land transportation), holding themselves out as carriers to the shipping public and as shippers to the underlying carrier. See Exemption of Freight Forwarders in the Noncontiguous Domestic Trade from Rate Reasonableness and Tariff Filing Requirements, STB Ex Parte No. 598, served Feb. 21, 1997, and published at 62 FR 9110 (Feb. 28, 1997).

⁵ NPR submitted a copy of an agreement between NPR and TAG dated December 3, 1989, entitled "Contract for Cargo Inspection, Collection and Demurrage Audit Services Between The Adherence Group Inc. and Puerto Rico Maritime Shipping Authority" plus subsequent amendments. NPR is the successor to the Puerto Rico Maritime Shipping Authority.

⁶ According to complainant, although Sea-Land, NPR, and Crowley are VOCCs and CSA is comprised of NVOCCs, all compete to transport the same traffic.

NPR, in its motion to dismiss, states that it has the legal right to inspect the cargo of any shipper⁷ and to subcontract the exercise of that right to a third party. NPR refers to the cargo inspection agreement between it and TAG that requires TAG to maintain the confidentiality of all documents and commercial information that it obtains while performing services under the agreement. NPR submits the sworn testimony of two NPR employees, each stating that TAG has never disclosed any confidential information regarding any shipper to NPR that was obtained from another carrier, and that neither employee is aware of TAG's disclosing confidential shipper information regarding a shipment transported by NPR to any other carrier or shipper. NPR asserts that the complaint is an attempt by CSA to disrupt and avoid the lawful cargo inspection activities of NPR and TAG, that the complaint does not allege a single instance of improper disclosure by TAG or NPR to any carrier or shipper, and that the complaint lacks any specific allegations of injury or detriment to CSA members.

TAG, in its motion to dismiss,⁸ states that CSA's complaint does not state reasonable grounds for investigation and action. TAG avers that all of its activities are conducted pursuant to lawful tariffs and that it does not disclose any information about shippers to other carriers or their representatives. In support of this claim, TAG cites its interest in maintaining complete confidentiality because of the sensitive relationships it maintains with numerous carriers throughout the world. TAG notes that its contract with NPR expressly prohibits it from disclosing any information received through its inspection activities, and provides for substantial liquidated damages (\$25,000) for each disclosure of confidential information.

In its reply, CSA backs off of its claim that TAG directly discloses information to nonparties to a given transaction, and instead, appears to adopt a new theory: that TAG "has become an 'informational clearinghouse' and has acquired a vast archive of confidential commercial information,"⁹ which it indirectly shares with all of its principals every time it works for any of them. CSA notes that TAG's common pool of information permits it to keep track of its experience with shippers, including those that have presented problems for one carrier, regardless of which of the VOCCs is handling a particular shipment. Thus, when it is working for Crowley, TAG may pay particular attention to a shipper that it knows, as a result of its work with NPR or Sea-Land, has a history of misdescribing shipments. It is this ability to use information it has obtained while working for one VOCC in the course of its inspections for another VOCC that CSA characterizes as an unlawful disclosure of information.

DISCUSSION AND CONCLUSIONS

⁷ NPR refers to its published Rule 992 in its Governing Rules Tariff (ICC NAVA 102A), which puts shippers on notice that NPR has reserved the right to inspect shipments and that such inspections may be performed by an authorized subcontractor. NPR Motion to Dismiss at 6.

⁸ Both NPR and TAG state that they concur in each other's motion to dismiss.

⁹ CSA Reply, p. 11.

The complaint provisions of 49 U.S.C. 14701(b) permit us to dismiss a complaint that "does not state reasonable grounds for investigation and action." Rules 1111.4(a) and 1111.5 of our General Rules of Practice implement these provisions by providing that we may issue a final decision upon the filing of an answer or on motion to dismiss.

The Interstate Commerce Commission, our predecessor with respect to most of our regulatory functions, has, with judicial approval, exercised its authority to dismiss complaints without holding an evidentiary hearing where the issues involved were essentially legal. See ZoneSkip, Inc. v. UPS, Inc. and UPS of America, Inc., 8 I.C.C.2d 645 (1992), aff'd mem. 998 F.2d 1007 (3d Cir. 1993), and case cited therein. Here, we have received sworn testimony from all parties. After reviewing that testimony and the legal arguments made, we have concluded that there really are no material factual issues that need to be resolved in this proceeding. Rather, the issue that CSA raises is essentially a legal one: whether TAG violates section 14908(a)(1), even though it does not directly share information with any other party, simply by virtue of the fact that it acts as the inspection agent for all three of the major VOCCs in the U.S./Puerto Rico trade. We find that CSA's position lacks merit as a matter of law. Therefore, we see no basis for going through discovery and protracted proceedings in order to permit CSA to pursue legal claims that will ultimately prove fruitless. We will dismiss the complaint.

We find no basis for granting relief in this matter or declaring TAG's practices to be violative of section 14908.¹⁰ As noted, CSA appears to have dropped its contention that TAG actually disseminates information directly to anyone; rather, its position now appears to be that, simply by virtue of having the information, and of being the inspection agent for more than one VOCC, TAG indirectly shares the information with all of its principals, in violation of the statute.¹¹ The logic of CSA's position would require each VOCC either to inspect all of its cargo itself, or to hire an inspection firm that has no business with any other VOCC or shipping interest.¹²

¹⁰ In its complaint, CSA raises a variety of claims about TAG's relationship with NPR, claiming, for example, that TAG should not "reinterpret" NPR's tariffs, or interfere with NPR's billing processes. These issues, to which NPR and TAG have adequately responded in their motions to dismiss, are not determinative of whether TAG violates section 14908 by virtue of the fact that it is the inspection agent for NPR, Sea-Land, and Crowley.

¹¹ CSA indicates that it will use the discovery process to determine "what TAG does with the commonly held and acquired information." TAG, however, has already told us what it does with the information: it uses it, but only as part of its policing operation. Absent some basis for concluding that TAG's sworn testimony is untrue, we will not continue this proceeding simply so that CSA can search for other possible claims. See Trailways Lines, Inc. v. ICC, 766 F.2d 1537, 1546 (D.C. Cir. 1985).

¹² In its response to CSA's reply to the motions to dismiss, TAG points out that the logic of CSA's position would
(continued...)

CSA's position is untenable. Section 14908, which is aimed at actual disclosures of information, is designed to protect shippers from harm resulting when their confidential information is disclosed to their shipper competitors. CSA asserts that section 14908 applies here because CSA's NVOCC members, in their capacities as carriers, compete with VOCCs. But even though NVOCCs are carriers vis-a-vis their shippers, they are shippers when they tender traffic to VOCCs. Section 14908 is not designed to frustrate legitimate efforts of VOCCs to prevent fraud and to ensure that their customers using sealed containers describe their cargo accurately. Yet, CSA would have us interpret the law to do just that.

TAG is a well established business that has worked for many carriers for many years. So long as confidential shipment information is protected, it is not unreasonable for several carriers to rely on a single firm, or a small group of firms, that have built up an expertise in the field. Limiting TAG's services to a single carrier, and requiring every other carrier to inspect cargo itself or to obtain a separate inspection agent, would produce obvious inefficiencies, and could encourage fraud by shippers, including CSA's members, by hampering carriers in their ability to inspect their cargo. Nothing presented in CSA's complaint, its testimony, or its argument persuades us that we should take action to interfere with existing business relationships that have been in place for many years.¹³ We see no basis on which to continue this proceeding, and it will be dismissed.

This decision will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. The complaint in this proceeding is dismissed.
2. TAG's motion to file its response is granted.
3. All other motions are denied as moot.
4. This decision takes effect April 24, 1997.

By the Board, Chairman Morgan and Vice Chairman Owen.

¹²(...continued)
require a finding that Government employees who use information obtained in one proceeding in a proceeding involving another carrier would also be guilty of violating section 14908(a)(1).

¹³ CSA, through the verified statement of Milton Kay, suggests that TAG's real objective is to harass NVOCCs and to encourage shippers to ship directly with the VOCCs. If this is the VOCCs' objective, however, they do not need TAG to achieve it; they are perfectly free to detain for extended inspections every single NVOCC container, regardless of whether they use TAG, some other inspection service, or an in-house inspection process. CSA's inference in this regard has no bearing on the claimed dissemination of information that is said to constitute a violation of section 14908.

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Vernon A. Williams
Secretary